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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

MANUEL AGUIAR

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Fourth Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A BUMP-LIKE BULGE ON THE ANKLE OF AN HISPANIC TRAVELER IS PROBABLE CAUSE FOR ARREST?

II.

WHETHER THE OBSERVATION OF A BUMP-LIKE BULGE ON THE ANKLE OF A TRAVELER WHICH DOES NOT GIVE PROBABLE CAUSE FOR ARREST CAN BE ENHANCED INTO PROBABLE CAUSE BY REFERENCE TO INNOCENT FACTORS CONTAINED IN THE DRUG COURIER PROFILE?

III.

WHETHER THE "HARKEY PROFILE" WHICH CONSISTS OF THE NORMAL DRUG COURIER PROFILE PLUS THE ADDITIONAL CHARACTERISTIC OF A BUMP-LIKE BULGE CONSTITUTES PROBABLE CAUSE?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the petitioner, his family, and the United States of America.

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RATION. THE LEVEL OF SUSPICION ARISING FROM A BULGE ON THE ANKLE OF A TRAVELER SHOULD BE SETTLED BY THIS COURT. THE MECHANICAL ADDITION OF DRUG COURIER PROFILE CHARACTERISTICS TO A PARTICULARIZED BUT INADEQUATE SUSPICION CANNOT ENHANCE THE SUSPICION INTO PROBABLE CAUSE. THE OPINION BELOW CONFLICTS WITH THE SIXTH CIRCUIT WHICH PROHIBITS CONSIDERATION OF THE DRUG COURIER PROFILE IN CONJUNCTION WITH OTHER PARTICULARIZED FACTS WHICH FALL SHORT OF PROBABLE CAUSE. THIS COURT HAS NOT DECIDED WHETHER A PROFILE CAN ENHANCE OTHERWISE INADEQUATE FACTS TO JUSTIFY AN ARREST. THE COURT OF APPEALS' RELIANCE UPON THE BULGE AT PETITIONER'S ANKLE TO JUSTIFY THE ARREST WAS ACTUALLY RELIANCE UPON A DRUG COURIER PROFILE.

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CASE NO.

In the Supreme Court of the United States

OCTOBER TERM, 1987

MANUEL AGUIAR

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Fourth Circuit

BRIEF OF PETITIONER ON JURISDICTION

Petitioner, Manuel Aguiar, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Fourth Circuit entered in Case No. 86-5533, on August 4, 1987 and September 4, 1987, which affirmed the denial of the motion to suppress and conviction and sentence of the United States District Court of the Western District of North Carolina.

OPINION BELOW

The opinion of the United States Court of Appeals, Fourth Circuit, denying the defendant's direct appeal is reported as *United States v. Aguiar*, 825 F.2d 39 (4th Cir. 1987) (A. 1).* The Magistrate's report and recommendation denying the motion to suppress, as upheld by the District Court, is unreported. The Magistrate's report and District Court order upholding the report are reprinted in the Appendix to this Petition (A. 7, 17). The order denying the Petition for Rehearing and Rehearing en Banc is reprinted in the Appendix (A. 22).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17(c) of the Rules of the Supreme Court and 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Fourth Circuit's Order on Rehearing. See Supreme Court Rule 20.1 and 20.4.

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*The symbol "A" is used to designate the Appendix of this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

An Indictment was filed charging the defendant in a five-count indictment. A motion to suppress evidence was filed by the defendant. After the District Judge upheld the Magistrate's Report and Recommendation denying the suppression motion, the defendant entered a plea of guilty to Count IV, which charged him with possession with intent to distribute cocaine, reserving the right to appeal the denial of the motion to suppress pursuant to Federal Rule of Criminal Procedure 11(a)(2).

The facts giving rise to the motion to suppress evidence are set forth in some detail in the opinion of the United States Court of Appeals at 825 F.2d 39 (4th Cir. 1987).

The defendant was arrested by a state police officer when he was making flight connections in the Charlotte, North Carolina airport as he traveled from Miami to Norfolk, Virginia. Charlotte police officer Donald

Harkey had been told by unknown concerned passengers arriving from Miami that there were two "Cuban boat people" on the plane who had been "rubbing their noses" and were then sitting in the airport bar. The officer went to the bar and observed Aguiar and his traveling companion sitting in the bar with normal carry-on luggage. (R-24).[1] The officers made eye contact with the two men.[2] The two men looked back at the officers. Aguiar went from the bar to the bathroom, and as he came back toward the bar, Officer Harkey saw a bump that was smaller than his fist on the inside of Aguiar's ankle where his sock dropped down, exposing white plastic. (R-33, 76)

Officer Harkey approached the defendant and requested his plane ticket which the defendant produced. The one-way ticket from Miami was issued to "Bruce Woods," was purchased by cash, and contained no baggage claim checks. The officer asked if Aguiar had further identification, and Aguiar responded that he did not. Harkey returned the plane ticket and advised he was investigating drug trafficking. (A. 10). Aguiar asked if the officer had an arrest warrant. Harkey responded, "No, sir, I do not but you are under arrest." Harkey then reached down to Aguiar's left ankle and felt the bump. Harkey pulled

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[1]The record references in this Petition are to the Record on Appeal which was before the Fourth Circuit. This record is available for transmittal to this Court should the Court so order. It is in Appendix form containing 130 pages.

[2]The Court of Appeals opinion states that the citizens "led the officers to a bar." (A. 2). In fact, the citizens merely told the officers the Hispanics were in the bar. (R.-23-24).

out from the defendant's sock a white plastic shower cap which was wrapped around a white envelope. (R-26). The Court of Appeals opinion stated that "Harkey observed others with such bulges and that the bulges always turned out to be packets of illicit drugs." (A. 5). This recitation of Harkey's testimony is partially inaccurate. Harkey testified that on each occasion *in the last year* that he saw a large bulge in the ankle area, he found it to be a controlled substance. (R-27). Harkey did not testify how many bulges he had observed in the last year. He testified that he has also found cigarettes in socks, pistols in ankle holsters, and money taped to ankles, presumably before last year. (R-80-81). There was no expert testimony offered regarding the experience of other officers or the general public regarding the frequency of innocent travelers securing legal valuables in their socks or on their ankles.

The Magistrate found that the officers involved in the Charlotte airport Drug Interdiction Program "rely heavily on the Drug Courier Profile to identify travelers who are most likely to be transporting drugs." (A. 8). The Drug Courier characteristics recited by the Magistrate were Aguiar's travel from a "source" city to a major narcotics receiving point,[3] his use of an alias,[4]

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[3]One court has wondered "whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center." *United States v. Andrews*, 600 F.2d 563, 567 (6th Cir. 1979).

[4]The assumption that an Hispanic appearing individual could not have an Anglo surname ignores the American melting pot experience.

and his obvious surveillance of the officer.[5] (A. 13-14).

The Court of Appeals in affirming the denial of the motion to suppress held:

> The fact that Augiar [sic] met a number of the drug courier profile characteristics—he traveled on a flight from Miami, a fertile source of narcotics, on a one-way ticket issued in a false name and paid for in cash and that there were no baggage claim checks—alone was not enough to constitute probable cause for arrest. *Whether or not the policeman's observance of the bulge at the ankle alone was enough to constitute probable cause for arrest, we need not decide, but in combination with the drug courier profile characteristics exhibited by Augiar, it would constitute probable cause for arrest.* Out of the policeman's experience, he recognized that the bulge was probably caused by a packet of illicit drugs strapped to the ankle. What the policeman knew and observed therefore was far more than the fact that Augiar met the generalized drug courier profile characteristics. (A. 5-6).

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[5]The Magistrate apparently did not credit the citizens' alleged report of rubbing noses since the officer did not corroborate this claim. Moreover, any traveler with a cold or sinusitis might rub his nose upon ascent or descent of the plane.

REASONS FOR GRANTING CERTIORARI

TREATING A BUMP-LIKE BULGE ON AN ANKLE AS GROUNDS FOR ARREST WOULD SUBJECT A LARGE CATEGORY OF PRESUMABLY INNOCENT TRAVELERS TO UNJUSTIFIED HUMILIATION OF ARREST AND SEARCH. THIS COURT CONDEMNED WARRANTLESS SEARCHES OF PACKAGES WHICH DO NOT CLEARLY ANNOUNCE THEIR CONTRABAND CONTENTS BY DISTINCTIVE CONFIGURATION. THE LEVEL OF SUSPICION ARISING FROM A BULGE ON THE ANKLE OF A TRAVELER SHOULD BE SETTLED BY THIS COURT. THE MECHANICAL ADDITION OF DRUG COURIER PROFILE CHARACTERISTICS TO A PARTICULARIZED BUT INADEQUATE SUSPICION CANNOT ENHANCE THE SUSPICION INTO PROBABLE CAUSE. THE OPINION BELOW CONFLICTS WITH THE SIXTH CIRCUIT WHICH PROHIBITS CONSIDERATION OF THE DRUG COURIER PROFILE IN CONJUNCTION WITH OTHER PARTICULARIZED FACTS WHICH FALL SHORT OF PROBABLE CAUSE. THIS COURT HAS NOT DECIDED WHETHER A PROFILE CAN ENHANCE OTHERWISE INADEQUATE FACTS TO JUSTIFY AN ARREST. THE COURT OF APPEALS' RELIANCE UPON THE BULGE AT PETITIONER'S ANKLE TO JUSTIFY THE ARREST WAS ACTUALLY RELIANCE UPON A DRUG COURIER PROFILE.

Common carrier terminal searches have emerged as the crucible for resolving the conflict between the citizen interest in an open society with free travel and the police interest in interdiction of drug traffic. Normally airport cases involve questions of whether the initial encounter is voluntary or is an investigatory stop. The twist in this case is that the defendant's mere inquiry as to whether he was under arrest precipitated his arrest, despite the fact that no contraband had been observed, no search had been conducted, and no admission of narcotic trafficking had been made.

The manner in which the Court of Appeals found that probable cause existed constitutes a dramatic departure from the prior opinion of this Court in *Reid v. Georgia*, 448 U.S. 438 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983). The Court of Appeals opinion articulates three significant assumptions:

1) That an innocent traveler would rarely carry a valuable item in his sock,

2) That a bulge in a traveler's sock may or may not constitute probable cause in and of itself, and

3) The questionable quantum of suspicion arising from the bulge was enhanced into probable cause by the addition of the drug courier profile characteristics.

I.

This Court held in *Reid v. Georgia*, 448 U.S. 438 (1980), that a profile compilation of characteristics typical of drug couriers could not be a basis, as a matter of law, for reasonable suspicion, much less probable cause, because these characteristics also describe a large category of presumably innocent travelers who would thus be subject to virtually random seizures. The problem with drug courier profiles is that they do not provide particularized suspicion of the individual traveler. *United States v. Hanson*, 801 F.2d 757 (5th Cir. 1986).

In an apparent effort to circumvent the rule of *Reid*, the Court of Appeals criminalized the use of socks to safeguard valuables:

> Nor can the observed bulge and white plastic be dismissed as just another drug courier profile characteristic. For a variety of reasons, many innocent persons would exhibit some or even many of those characteristics, but few innocent people carry treasures in packets wrapped in plastic and strapped to their ankles. A United States Navy enlisted man in uniform without pockets may carry a package of cigarettes in his socks, but Augiar [sic] was not in any such uniform. If other innocent people carry precious possessions in packets strapped to their ankles, they must be extremely rare. (A. 5).

In these four sentences, the Court of Appeals has placed all citizens on notice that, unless they are Navy men in uniform, they are subject to not only investigatory stops but also arrest if they carry a pack of cigarettes, money, or any other valuables in their sock or have a bandage on their ankle—be it for fear of pickpockets, for lack of pants pockets, by force of innocent habits gained while in the armed services or from medical necessity. The foregoing innocent reasons that lead many citizens to carry valuables in their socks demonstrate that a bulge cannot be an individualized basis of suspicion. At most, such an observation is merely a profile characteristic.

The Court of Appeals avoids making a specific statement that the bulge, in and of itself, gives probable cause. The opinion is ambivalent on this issue, saying only "[w]hether or not the policeman's observance of the bulge at the ankle alone was enough to constitute probable cause for arrest, we need not decide. . . ." (A. 5-6). If the opinion is viewed as impliedly holding that a bulge is, *per se*, probable cause, such an assumption would conflict with this Court's holding in *Robbins v. California*, 453 U.S. 420, 428 (1981). In *Robbins* this Court rejected the lower court's finding that any experienced observer could have inferred from the appearance of plastic-wrapped blocks that they contained marijuana. This Court noted:

> [A] *container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer.* If

> indeed a green plastic wrapping reliably indicates that a package could **only** contain marihuana, that fact was not shown by the evidence of record in this case.

No court has held that a bulge on the ankle of a traveler is *per se* probable cause.[6] *United States v. Elsoffer*, 671 F.2d 1294, 1299 (11th Cir. 1982) involved a finding of probable cause from a large book-shaped bulge covering the waistline to crotch area. This location of the bulge is an abnormal place compared to the ankle. The traveler tried to cover the bulge from an agent who showed his police identification. The court took pains to note:

> We emphasize the limited nature of our finding. *We do not hold that any bulge on a person would give probable cause for an arrest.* The crucial consideration here is the odd size and shape of the bulge with respect to its position on appellant's person. Before reaching our conclusion, we examined photographs of the original package.

Thus, to the extent that the Court of Appeals based probable cause to arrest Aguiar on the bulge, it also decided an important question of federal law which should be settled by this Court. In any event, it is apparent that this is a recurring question which the Courts of Appeal are reluctant to directly address without guidance from this Court.

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[6]In fact, the Fourth Circuit has held that a 4" × 6" bulge on a traveler's back beneath his jacket, taken alone, would not be sufficient to warrant even reasonable suspicion, much less probable cause. *United States v. Harrison*, 667 F.2d 1158, 1161 (4th Cir. 1982).

II.

If, on the other hand, the Court of Appeals' opinion is based upon the assumption that the bulge alone did not give rise to probable cause, then mechanical matching of drug courier profile characteristics to vault the bulge into probable cause was improper. A review of this Court's treatment of the drug courier profile reveals some division regarding the impact of the profile but a clear recognition of the danger of mechanistic reliance upon it to justify seizures.

In *Reid v. Georgia*, 448 U.S. 438 (1980), this Court noted as particularized facts that the defendant preceded another passenger down the airport concourse and occasionally looked back. The so-called profile characteristics consisted of travel from a source city at hours of reduced law enforcement activity with no luggage. This Court held as a matter of law the agent could not reasonably suspect the petitioner. *Reid* did not explain whether drug courier profile characteristics which also describe a large category of presumably innocent travelers could be considered in addition to particular facts to determine if reasonable suspicion or probable cause existed.

In *Florida v. Royer*, 460 U.S. 491, 525 (1983), the plurality did not address the use of drug courier profiles in determining whether probable cause exists, but the dissent by Justice Rehnquist argued that facts contained in the drug courier profile alone could possibly constitute reasonable suspicion. *Royer*, 460 U.S. at 525, n.10.

In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justices Stewart and Rehnquist wrote that the petitioner was either not seized or she voluntarily accompanied the officers to the DEA office. The Chief Justice and Justices Powell and Blackmun concurred by concluding that the petitioner was seized but that the seizure was justified because her behavior matched the drug courier profile. Justices White, Brennan, Marshall and Stevens dissented with an opinion which questioned the efficacy of the drug courier profile in providing reasonable suspicion.

Thus, the proper role of the drug courier profile in determining suspicion or probable cause has never been clearly explained by this Court except to say that drug courier profile characteristics, standing alone, will not automatically provide reasonable suspicion.

This case demonstrates that there is conflict within the Circuits regarding the role of the drug courier profile in determining probable cause. The Fourth Circuit Court of Appeals in the case *sub judice* held that such drug courier profile characteristics could be considered in conjunction with facts whose suspicion level was undetermined to arrive at a sum of probable cause. Such action is in direct conflict with the Sixth Circuit Court of Appeals decision in *United States v. Lewis*, 556 F.2d 385, 389 (6th Cir. 1977), which held that the fact the defendant exhibited drug courier profile characteristics could not be mechanistically considered in conjunction with other particularized facts which fell short of probable cause. The Sixth Circuit Court of Appeals noted that the drug courier profile is (1) too amorphous to be integrated into a legal standard, (2) the profile

would lead to improper analysis because it could not be synthesized into the sum total of information, and (3) use of the profile could too easily result in giving undeserved significance to certain facts and distort appraisal of the sum total of facts.

III.

As noted above, a fair analysis of the bulge observed by Officer Harkey leads to the conclusion that it was a type of activity engaged in by a large category of presumably innocent travelers. As such it is merely another characteristic of Officer Harkey's drug courier profile. It does not provide any particularized suspicion with respect to the petitioner. Harkey's profile standing alone cannot provide probable cause any more than the profile in *Reid v. Georgia*, 448 U.S. 420 (1981), supplied reasonable suspicion.

CONCLUSION

The Court is urged to grant certiorari in order to settle the important issues of federal law and to resolve conflicts between circuits.

Respectfully submitted,

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Appendix

[FILED JAN 16 1986]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5533

UNITED STATES OF AMERICA,

Appellee,

v.

MANUEL AGUIAR, a/k/a Bruce Woods,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge. (CR C-CR-85-88)

Argued: November 10, 1986 Decided: August 4, 1987

Before WIDENER, Circuit Judge, HAYNSWORTH, Senior Circuit Judge, and MAXWELL, United States District Judge for the Northern District of West Virginia, sitting by designation.

Rodney S. Toth on brief for Appellant; Max O. Cogburn, Jr., Chief Assistant U.S. Attorney (Charles R. Brewer, United States Attorney on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

This is another case of an arrest in an airport of a drug courier in which the courier unsuccessfully sought suppression of cocaine and drug transaction records seized in the airport search.

After denial of his suppression motion, Augiar entered a plea of guilty to the count of the indictment charging him with possession with intent to distribute cocaine, after having reserved the right to appeal the denial of his suppression motion pursuant to Fed. R. Crim. P. 11(a)(2).

I.

Upon arrival at the Charlotte, North Carolina airport of a Piedmont Airlines flight from Miami, two unidentified "concerned citizens" requested law enforcement officials to meet them at the information desk. SBI Agent J. A. Davis and Charlotte police officer Donald Harky responded. They were told by the two concerned citizens that two Hispanic men on the flight from Miami were suspected of using cocaine. The citizens reported that the two Hispanics, who claimed to be Cuban boat people, had been repeatedly rubbing their noses. They led the officers to a bar where Augiar and Aleman were seated at a circular booth with two pieces of luggage on the seat between them. Augiar was observed as he left the bar and went to a restroom. As Augiar was returning from the restroom to the bar, Harky noticed a large bulge on Augiar's left ankle and some white plastic showing beneath the cuff of his left trouser leg. Harky testified that he had observed other

passengers' with bulges at the ankles and that on each occasion it turned out that the bulge was a packet of illegal drugs.

Harky was in casual civilian dress, but as Augiar approached, Harky produced his official identification and said "Excuse me, sir, may I talk with you?" After taking a backward step and a brief pause, Augiar responded, "Sure, I'll talk with you." Upon request to see his plane ticket, Augiar produced one issued in the name of Bruce Woods. It was for a one-way flight from Miami, having been paid for in cash, and there were no baggage claim checks.

Harky asked Augiar if he had any identification. Augiar said that he did not. Augiar inquired what the problem was and was told that a narcotics investigation was being conducted. Augiar inquired about an arrest warrant. Harky said he had no arrest warrant but placed Augiar under arrest. Harky then reached down to Augiar's left ankle and removed a white plastic shower cap containing a white envelope. The envelope contained white powder, later determined to be cocaine.

Agent Davis then approached Aleman and told him of Augiar's arrest. He agreed to accompany the officers to the Narcotics Interdiction Office where he was found to have a small quantity of marijuana on his person. In the luggage of the two men there was another plane ticket in the name of Bruce Woods, a large plastic bag containing cocaine and business records of a number of drug transactions.

II.

Augiar first contends that the initial encounter with Harky was not consensual but a *Terry*-stop for which there was no supportive reasonable suspicion. Augiar emphasizes the initial display of Harky's official identification, the fact that Augiar was not told he was free to leave, the fact that Augiar's initial response was a backward step and the fact that he soon inquired what the problem was.

The finding that his initial encounter was consensual is not clearly erroneous. Harky testified that he would have detained Augiar if Augiar had not agreed to talk with him. That subjective intention may be considered as lending coloration to the encounter, but that does not compell a finding that the initial encounter was not consensual. Augiar was faced with a single law enforcement officer dressed in casual civilian clothing. Until the arrest, Harky did not touch Augiar. Harky made no move in an apparent attempt to place himself in the way of Augiar's departure, and the plane ticket was returned to Augiar before Harky inquired about the existence of any identification. Except for the fact that Harky had identified himself as a law enforcement official, there was no showing of force or intimidating threat.

The finding that the encounter was consensual and that Harky had requested, rather than commanded, that Augiar speak with him is not clearly erroneous.

III.

Augiar questions the existence of probable cause to arrest him, relying upon *Florida v. Royer*, 460 U.S. 491 (1983). He contends that the fact that he met a number of drug courier profile characteristics did not supply probable cause to arrest him. That was the holding in *Royer*, but there was more here than the fact that Augiar met a number of the well-known drug courier profile characteristics. There was the large bulge at the left ankle and the piece of white plastic that could be observed when Augiar walked coupled with the testimony that Harky observed others with such bulges and that the bulge had always turned out to be packets of illicit drugs. Nor can the observed bulge and white plastic be dismissed as just another drug courier profile characteristic. For a variety of reasons, many innocent persons would exhibit some or even many of those characteristics, but few innocent people carry treasures in packets wrapped in plastic and strapped to their ankles. A United States Navy enlisted man in uniform without pockets may carry a package of cigarettes in his socks, but Augiar was not in any such uniform. If other innocent people carry precious possessions in packets strapped to their ankles, they must be extremely rare.

The fact that Augiar met a number of the drug courier profile characteristics—he traveled on a flight from Miami, a fertile source of narcotics, on a one-way ticket issued in a false name and paid for in cash and that there were no baggage claim checks—alone was not enough to constitute probable cause for arrest. Whether or not the policeman's observance of the bulge at the

ankle alone was enough to constitute probable cause for arrest, we need not decide, but in combination with the drug courier profile characteristics exhibited by Augiar, it would constitute probable cause for arrest. Out of the policeman's experience, he recogized that the bulge was probably caused by a packet of illicit drugs strapped to the ankle. What the policeman knew and observed therefore was far more than the fact that Augiar met the generalized drug courier profile characteristics.

IV.

The search of the envelope was lawful as incident to the lawful arrest, as was the subsequent search of the luggage and seizure of the large packet of cocaine and the records of drug transactions. Thus, the district court properly denied the defendant's suppression motion.

AFFIRMED.

[FILED NOV 27 1985]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

C-CR-85-88

UNITED STATES OF AMERICA

v.

MANUEL AGUIAR, a/k/a Bruce Woods

MEMORANDUM AND RECOMMENDATION

THIS MATTER is before the court upon defendant's Motion to Suppress Evidence seized from him on September 9, 1985, at Douglas International Airport in Charlotte. On November 14, 1985, defense counsel and the prosecutor stipulated that the evidence presented at defendant's probable cause and detention hearings would also be used as the evidence for the parties on the Motion to Suppress. After careful review of the evidence presented at the probable cause and detention hearings, I submit the following proposed findings of fact and conclusion of law and I recommend that defendant's Motion to Suppress be denied.

FINDINGS OF FACT

S.B.I. Agent J.A. Davis and Charlotte Police Officer Donald Harkey are assigned to Douglas International

Airport in Charlotte as part of a local Drug Interdiction Program. The program, which was begun in Charlotte in the fall of 1978, is intended to promote the interception of controlled substances being transported to and through Charlotte via commercial air travel. The law enforcement officers involved in the program rely heavily on the Drug Courier Profile[1] to identify travelers who are most likely to be transporting drugs.

At around 5:00 p.m. on September 9, 1985, Agent Davis was called to the information counter at the airport. Probable cause hearing transcript at 3 (Hereinafter "Tr."). Harkey accompanied Davis to the counter where two "concerned citizens" were waiting to talk to the officers. Tr. at 3. The citizens said that they had just arrived in Charlotte on a non-stop flight from Miami. Tr. at 3. While on the plane, the citizens talked to two Hispanic men who claimed to be Cuban boat people. Tr. at 3. According to the citizens, the men kept rubbing their noses, which caused the citizens to suspect the men of using cocaine. Tr. at 3-4. The citizens went on to give the officers a description of the men and their attire and to tell the officers that the men were in the bar at the end of "C" concourse. Tr. at 4.

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[1]"In 1974, the Department of Justice Drug Enforcement Administration instituted training programs for its narcotics officers wherein instruction was given on a 'drug courier profile'. A 'profile' is, in effect, the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers." *Florida v. Royer*, 460 U.S. 491, 525 n.6 (1983) (Rehnquist, J., dissenting).

Davis and Harkey went directly to the bar where they located two men who matched the descriptions given by the citizens. Tr. at 4-6. The men were sitting in a circular booth with two pieces of luggage between them. Tr. at 19. Davis and Harkey made eye contact with the men and then left the bar. Tr. at 5. The officers noticed that the men watched them closely as they walked outside to the concourse. Tr. at 5.

Shortly thereafter, the officers watched as one of the two men, Manual Aguiar, left the bar and walked to a restroom on the concourse. Tr. at 5. At the same time, Harkey noticed the other man watching him and Davis from inside the bar. Tr. at 5. Davis and Harkey moved closer to the restroom door and, moments later, Aguiar came out of the restroom, made eye contact with Harkey and began walking directly toward him. Tr. at 6. As Aguiar was walking, Harkey noticed a large bulge on Aguiar's left ankle and some white plastic hanging beneath the cuff of his slacks. Tr. at 6. Based upon his observations of Aguiar's ankle and his behavior, and upon his past experiences in intercepting drug couriers, Harkey concluded that Aguiar had drugs strapped to his left ankle[2]. Tr. at 6-8, 17. Harkey turned to Davis and said, "Jack, he has it strapped to his ankle." Tr. at 6, 19. In reply, Davis said that he would go back into the bar. Tr. at 6.

Aguiar was still walking in Harkey's direction when Harkey approached him. Tr. at 6, 17. Displaying his

[2]Harkey testified that, in the past year, every time he has seen a large bulge on an individual's ankle, he has found the bulge to be a controlled substance.

identification,[3] Harkey said, "Excuse me, sir, may I talk with you?" Tr. at 6, 17. Aguiar took a step backward and, after a brief pause, replied, "Sure, I'll talk with you." Tr. at 6,17. Harkey then asked to see Aguiar's ticket. Tr. at 6, 17. Aguiar produced a Piedmont Airlines ticket in the name of Bruce Woods. Tr. at 6. Harkey noticed that the ticket was for a one-way trip, had been paid for in cash, and contained no baggage claim checks—all of which are drug courier characteristics. Tr. at 6, 17. Harkey also found to be significant the fact that Aguiar's ticket was for a trip from Miami to Norfolk, Virginia. Tr. at 8. Harkey knew Miami to be a "source" city for narcotics and had received intelligence information indicating that Norfolk was a major termination point for drugs coming out of Miami. Tr. at 8-9.

Harkey returned the ticket and asked Aguiar if he had any identification. Tr. at 7. Aguiar replied that he did not, and he asked Harkey, "What is the problem?" Tr. at 7, 17. Harkey told Aguiar that he was conducting a narcotics investigation. Tr. at 7, 17. Aguiar asked Harkey, "Do you have an arrest warrant for me?" Tr. at 7, 17. Harkey said, "No, sir, I do not, but you are under arrest at this time." Tr. at 7, 17. At this point, Harkey reached down to Aguiar's left ankle and removed a white plastic shower cap which was wrapped around a white envelope. Tr. at 7, 17. When he squeezed the envelope, Harkey could feel powder inside and a small amount of white powder escaped from one end of

[3]The officers in the local drug interdiction program wear civilian clothes while on duty.

the envelope. Tr. at 7. Subsequent laboratory analysis of the powder confirmed that it was cocaine. Tr. at 13-14, 18.

After frisking and handcuffing Aguiar, Harkey told him that they were going back in the bar to get Aguiar's friend. Tr. at 7. Despite Aguiar's insistence that he did not have a friend in the bar, the two men returned to the bar as Agent Davis approached Aguiar's companion, Leonard Aleman. Tr. at 7, 9.

Agent Davis told Aleman that Aguiar was under arrest and asked if he would like to go with them to the Narcotics Interdiction Office. Tr. at 7, 9. Aleman agreed to go and, after picking up the two suitcases positioned next to him in the booth, he followed Davis out of the bar. Tr. at 7, 9.

As Davis and Aleman followed Harkey and Aguiar to the Narcotics Interdiction Unit Office, Aleman provided Davis with his airline ticket and identification. Once the group reached the office, Davis asked Aleman if he would agree to a pat-down search and Aleman said that he would. Tr. at 10. In the course of the search, Davis located a small quantity of marijuana and placed Aleman under arrest. Tr. at 10. Davis then asked Aleman for permission to search his briefcase. Tr. at 10. Aleman agreed to the search and provided Davis with a combination to the lock on the briefcase. Tr. at 10. Inside the briefcase, Davis found another plane ticket for Bruce Woods and business records which detailed a variety of drug transactions. Tr. at 10. Davis then asked Aleman about the black suitcase he had been carrying and Aleman stated that the bag did not belong

to him and he did not know to whom it belonged. Tr. at 13. Davis next asked Aguiar if the suitcase belonged to him and Aguiar replied that he wouldn't say anything until he spoke to an attorney and he reminded Davis that he had not been read his *Miranda* warnings. Tr. at 28. *See also* Tr. at 11, 13, 21, 29. Davis opened the black suitcase and found a large plastic bag containing cocaine, along with some clothes. Tr. at 13-14, 29.

CONCLUSIONS OF LAW

A. ARREST AND SEARCH OF AGUIAR

In order to determine whether Harkey's stop of Aguiar at the airport violated Aguiar's rights under the Fourth Amendment, it must first be determined whether the stop was a seizure. *United States v. Mendenhall*, 446 U.S. 544 (1980). In making this determination, it should be remembered that

> "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

Immigration and Naturalization Service v. Delgado, ____ U.S. ____, ____, 104 S. Ct. 1758, 1761 (1984).

Under the totality of the circumstances, I find that Harkey's initial contact with Aguiar did not amount to a seizure under the Fourth Amendment. Harkey's

preliminary approach of Aguiar did not include a show of force and was not threatening or intimidating in any way. Instead, Aguiar was faced with a single law enforcement officer who was in casual clothes and approaching him in very public surroundings. Harkey's precatory request of Aguiar ("May I talk with you?") made it abundantly clear that Aguiar had the right to refuse. This very brief encounter continued to be consensual until Harkey advised Aguiar that he was under arrest. By that time, Harkey had abundant probable cause to justify an arrest.

Probable cause exists if " 'the facts and circumstances within [the arresting officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense had been or is being committed." *Draper v. United States*, 358 U.S. 307, 313 (1964), *quoting Carroll v. United States*, 267 U.S. 132, 162 (1925). In assessing probable cause, the court must take into account that trained law enforcement officers may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979). Here, Harkey attached special significance to the bulge on Aguiar's ankle as the result of his previous contact with other persons using the same method to transport drugs. Moreover, the plastic protruding from under Aguiar's pants leg provided corroboration for Harkey's conclusion that the bulge was caused by contraband rather than by a wallet or other personal item that Aguiar was concealing for security reasons. Further corroboration for Harkey's conclusion was provided by Augiar's drug

courier characteristics,[4] his travel from a "source" city to a major narcotics receiving point, his use of an alias[5] and his and Aleman's obvious surveillance of Harkey and Davis.

In short, the bulge on Aguiar's ankle, viewed in light of the surrounding circumstances and Harkey's prior experience, was sufficient to create a reasonable belief that an offense was being committed. *See United States v. Elsoffer*, 671 F.2d 1294 (11th Cir. 1982); *United States v. Roundtree*, 596 F.2d 672 (5th Cir.), *cert. denied*, 444 U.S. 871 (1979). Accordingly, I conclude that Harkey's arrest of Aguiar and the ensuing search were constitutionally permissible.

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[4]In *Reid v. Georgia*, 448 U.S. 438 (1980), the Supreme Court held that general characteristics included in the Drug Courier Profile which apply to a large number of innocent travelers cannot *alone* reasonably support a suspicion of criminal activity. *United States v. Corbin*, 662 F.2d 1066 (4th Cir. 1981). However, such characteristics "coupled with other suspicious circumstances may provide the reasonable grounds for [probable cause] required under the Fourth Amendment." *United States v. Harrison*, 667 F.2d 1158, 1161 (4th Cir.), *cert. denied*, 457 U.S. 1121 (1982).

[5]In light of Aguiar's Hispanic appearance and the "concerned citizens' " statements that Aguiar had claimed to be a Cuban boat person, Harkey had reason to believe that Aguiar was traveling under an assumed or false identity, *i.e.*, Bruce Woods. The use of a false identity is another drug courier characteristic.

B. SEARCH OF THE BRIEFCASE AND SUITCASE

The "capacity to claim the protection of the Fourth Amendment depends . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Moreover, the burden is upon the proponent of a suppression motion to establish that his legitimate expectation of privacy has been violated by the challenged search. *United States v. Bellina*, 665 F.2d 1335 (4th Cir. 1981).

In this case, Aguiar has not shown that his privacy interests were infringed by the search of either the briefcase or the black suitcase. The evidence showed that Aleman picked up both of them when he left the bar with Davis. Neither Aguiar nor Aleman claimed ownership or knowledge of the black suitcase; however, Aleman gave Davis permission to search the briefcase and provided him with the combination to the locks. Even assuming *arguendo* that the papers in the briefcase belonged to Aguiar, this fact alone is insufficient to meet defendant's burden of proof. *See Rawlings v. Kentucky*, 448 U.S. 98 (1980). Thus, to the extent that defendant's Motion to suppress encompasses the items seized during the search of the briefcase and black suitcase, the Motion should be denied.

RECOMMENDATION

Based upon the foregoing proposed findings of fact and conclusions of law, I respectfully recommend that defendant's Motion to Suppress be denied.

Counsel are hereby advised that, pursuant to 28 U.S.C. §636(b)(1)(C), written objections to the proposed findings of fact and conclusions of law and the recommendation contained in this Memorandum must be filed within ten (10) days after service of same. Failure to file objections to this Memorandum with the district court will preclude counsel from raising such objections on appeal. *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, ____ U.S. ____, 52 U.S.L.W. 3844 (May 21, 1984).

The Clerk is directed to certify copies of this Memorandum and Recommendation to defense counsel and the United States Attorney.

This 27th day of November, 1985.

/s/ Barbara H. DeLaney

BARBARA H. DeLANEY
UNITED STATES MAGISTRATE

[FILED JAN. 16 1986]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

C-CR-85-88

UNITED STATES OF AMERICA

vs.

MANUEL AGUIAR, a/k/a Bruce Woods

ORDER

THIS MATTER came on to be heard and was heard before the undersigned at Charlotte, North Carolina on January 17, 1986. The Government was represented by Assistant United States Attorney Kenneth P. Andresen. Defendant Aguiar was represented by Alvin E. Entin of the Florida Bar and Keith M. Stroud of the North Carolina Bar.

Defendant Aguiar filed on December 3, 1985 Objections to Magistrate's Findings of Fact and Conclusions of Law:

(1) that Agent Harkey's initial contact with Aguiar did not amount to a seizure under the Fourth Amendment;

(2) That probable cause existed for the stop;

(3) that Defendant Aguiar did not have standing to contest the search of the briefcase and suitcase; and

(4) that the cocaine should not be suppressed.

Defendant Aguiar also filed a request for review of the Detention Order.

Objections to Magistrate's Findings of Fact and Conclusions of Law

After a *de novo* hearing the Court finds that the Magistrate's Findings of Fact and Conclusion of Law are supported by the evidence and the applicable law, and the Court will affirm.

The only evidence offered by the Defendant Aguiar which would be materially significant if it were credible would be a pair of boots worn by the Defendant which reached above the ankle up the calf of his leg. The boots appeared to be relatively new and manifestly had little wear. The Defendant explained the new appearance by saying that even though he had had the boots a number of months he had not worn them many times. The Court simply does not believe the Defendant that he was wearing those boots when he was seen by the agents at the airport on September 9, 1985.

Request for Review of Detention Order

The Defendant states in his request for review "That as a major basis for denying the Defendant's application for bond was due to the suspect nature of his

employment." The Defendant has misinterpreted the Court's reasons for detaining the Defendant. Employment, or lack of it, was only one of the reasons.

If the Defendant will read the Court's Order filed December 16, 1985 he will see that the Court agreed with the Magistrate's Order which this Court affirmed. He will find that the Magistrate's Order and this Court's Order were more concerned with the Defendant's substantial and ongoing involvement with drug trafficking, his lack of ties to the community, his past arrests for drug offenses, the penalty for the drug offense he is now charged with, and for which the Magistrate found probable cause, his apparent association with the "ice cream man", Mr. Marrone who is on probation for drug related charges, and other matters referred to in that Order which led the Court to find that the Defendant had not met his burden of production by having brought forward evidence which reasonably assures his appearance and the safety of the community as required by 18 U.S.C. §3142(g).

At the hearing on the Defendant's request for review of the Detention Order the Court indicated it would have the probation office in Key West, Florida contact a Mr. E. Taylor of C. Television Service from whom the Defendant produced a letter stating that he would be willing to give the Defendant work. However, after reviewing its previous Order and the other circumstances of this case, the Court determined that even if the Defendant were offered employment the Court would not find that he had met his burden of production of evidence to rebut the statutory presumption that no condition or combination of

conditions would reasonably assure the appearance of the Defendant at trial under the totality of circumstances of this case.

At the hearing, the Defendant also made an oral motion for continuance of his trial from the week of January 13, 1986, to the February 1986 Criminal Term in order to allow time for preparation for trial after his Motions had been ruled upon. The Defendant Aguiar's co-defendant, Aleman, has also requested a continuance because of his attorney Rosin's scheduling conflicts. The Court will grant the Defendant Aleman's motion. The Court is of the opinion that the Defendants Aleman and Aguiar are properly joined for trial and should be tried together. For the reasons stated the Court finds that the ends of justice served by the granting of Defendant Aguiar's Motion for continuance outweigh the best interests of the public and Defendant in a speedy trial.

NOW, THEREFORE, IT IS ORDERED that:

(1) The Magistrate's Memorandum and Recommendation filed November 27, 1985 is **AFFIRMED** and the Defendant's Motion to Suppress is **DENIED**;

(2) The Magistrate's Order of Detention is **AFFIRMED**;

(3) The Defendant's Motion to Continue to the February 1986 Criminal Term is **GRANTED**; and

(4) Any plea agreements must be filed by 5:00 p.m. on January 21, 1986.

The Clerk is directed to certify copies of this order to defense counsel and the United States Attorney.

This the 15th day of January, 1986.

/s/ Robert D. Potter

ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

[FILED SEP. 4 1987]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5533

United States of America,

Appellee

versus

Manuel Aguiar,

Appellant.

O R D E R

Upon consideration of the petition for rehearing with the suggestion of rehearing *en banc*, and no poll of the court having been requested on the suggestion of rehearing *en banc*, and with the concurrence of Judge Widener and Judge Maxwell.

IT IS ORDERED that the petition for rehearing be, and the same is hereby, denied.

FOR THE COURT

/s/ Clement F. Haynsworth, Jr.
Senior United States Circuit Judge

September 4, 1987